The limitation period under item 76 of the Schedule to the Ordinance is three years computed from the time when the fraud became known to the party wronged. We agree with the learned Judge that the Respondents discovered the fraud in November 30, 1974 according to the facts disclosed. They filed the writ on September 29, 1977 i.e. within the three year limit from the time of discovery. The Respondents were well within time and are therefore not barred by limitation.

It was submitted that section 18 refers to a person and not a firm and since fraud is personal to an individual the Appellants cannot seek protection under the section. We are satisfied that although the Appellants are a firm of solicitors the claim was directed against all the three partners for whom appearance was entered on October 13, 1977 naming the individual partners of the company as the defendants therein. That is in line with Order 48A Rule 7 of R.S.C. (O.77 r.4 of R.H.C., 1980) which requires appearance to be made in the names of the partners but the action shall continue in the name of the firm. Since the names of the partners are specified it is competent to sue a firm for damages on ground of fraud (*Thomson & Co.* v. *Pattison Elder & Co.*[15]). In the light of the above, we are of the view that each and every one of the three individual partners fall within the ambit of the word "person" in section 18.

Damages

There was no serious argument on the quantum of damages. The Respondents' loss was purely financial. They had lost the security for the loan that they had advanced and were unable to recover it due to the Appellants' breach of retainer and negligence. As for authority that a claim for purely financial loss without injury to the person or property is no bar to liability for negligence we refer, as did the learned Judge, to *Ross* v. *Caunters (a firm)*[16] with which we agree.

We hereby confirm the judgment of the learned Judge and the award of damages stated therein with interest and costs to be taxed.

The appeal is hereby dismissed with costs. The deposit should be paid to the Respondents.

Appeal dismissed.

Solicitors: *Goh & Liew; Thomas & Co.*

VOO SYUN MUI v. YAP MOOI MOOI

[F.C. (Salleh Abas Ag. L.P., Abdul Hamid & Syed Agil Barakbah F.JJ.) November 15, 1983 & February 28, 1984
[Kuala Lumpur – Federal Court Civil Appeal No. 322 of 1982]

Contract – Sale of land and house – Option to purchase – Option exercised – Binding Contract.

In this case the appellant gave an option to the respondent to purchase her property in Kuala Lumpur. The respondent exercised the option by letter delivered to one Teo Teo Sen at the appellant's house. Subsequently the letter was returned to the respondent. The respondent applied for specific performance of the contract. Wan Hamzah J. held in the High Court that the respondent had validly exercised the option and that there was a binding contract between the parties. He granted specific performance of the contract. The appellant appealed.

Held: (1) there was no reason to differ from the finding of the learned trial judge that the respondent did exercise the option by tendering the 10% deposit but this was rejected by the appellant;

(2) on the question of law the learned Judge was correct in holding that the appellant had failed to show that there were matters to be discussed between her and the respondent and which had to be embodied in a formal sale and purchase agreement.

Case referred to:

(1) *Lim Keng Siong & Anor* v. *Yeo Ah Tee* [1983] 2 M.L.J. 39.

HIGH COURT.

Abdul Ghani Abdullah for the plaintiff.
Haji Abdul Karim Bashir for the defendant.
Cur. Adv. Vult.

Wan Hamzah J.: The Defendant gave the Plaintiff an option in writing in the following terms:–

"In consideration of the sum of $300.00 paid by Madam Yap Mooi Mooi (f) (NRIC NO. 0487210) of No. 34, Cross Street, Kuala Lumpur (the receipt of which I hereby acknowledge) I hereby grant to Madam Yap Mooi Mooi an option to purchase my property known as Lot 39, Bukit Seputeh, Kuala Lumpur at the price of $270,000.00 only.

On exercising the option a deposit of 10% of the sale price shall be paid and the balance of the sales price shall be paid within one (1) month from the payment of the deposit.

This option shall be valid for 2 weeks from the date hereof."

The option was dated August 8, 1980 and therefore the last date for the Plaintiff to exercise the option was August 22, 1980. The Plaintiff alleges that a letter exercising the option together with a cheque

in the sum of $27,000 being payment of deposit of ten percent of the purchase price was given to and acknowledged by a servant and/or agent of the Defendant on August 20, 1980. The Plaintiff alleges that in spite of the fact that the option had been exercised the Defendant has refused to complete the sale and therefore the Plaintiff asks for an order of specific performance of the option and of the sale of the property. The Defendant denies having received the letter or the cheque. She also denies that any servant and/or agent of hers received the letter or the cheque, and alleges that she had no servant and/or agent. She contends that the option had expired without the Plaintiff having exercised it. The Defendant further contends that the option was subject to contract being signed and that no contract was ever signed, and therefore there was no concluded contract between the Plaintiff and the Defendant.

On August 8, 1980 the Plaintiff and the Defendant had a meeting in Melaka at the office of Miss Pang, a lawyer. The lawyer prepared the option letter. The Plaintiff paid the Defendant $300 as consideration for the option and the Defendant signed the option and gave it to the Plaintiff. The Defendant told the Plaintiff that she would come to Kuala Lumpur in a few days time to sign a sale and purchase agreement. The Plaintiff told the Defendant that on the Defendant's visit to Kuala Lumpur she would take the Defendant to her lawyer, and she would pay the 10% deposit at the time of signing the agreement. The Plaintiff was waiting for the Defendant at Kuala Lumpur for four or five days but the Defendant did not turn up. So the Plaintiff went to see the Defendant at Melaka. The Defendant explained to the Plaintiff that he had been busy and therefore could not come to Kuala Lumpur. On that day the Defendant promised again that she would come to Kuala Lumpur in a few days time, but again she did not turn up. On August 18, 1980 the Plaintiff went to the house the subject matter of the option. There she met the Defendant. The Defendant told her that she (the Defendant) refused to sell the house to her and was willing to pay her compensation instead. On the same day the Plaintiff got her solicitor Mr. Choong Yik Son to prepare a letter of exercise of option (Exhibit P3). The next morning she went with her son, her brother and her brother's wife to the Defendant's house at Melaka. There the Plaintiff met one Teo Teo Sen. She told him that she had an important letter to give to the Defendant. He said that he had a drink with the Defendant just five minutes before the Plaintiff arrived, and he helped to knock at the door, but nobody appeared or opened the door. Plaintiff was not able to see the Defendant but the Defendant's car was there. The Plaintiff's son handed to Teo Teo Sen a sealed envelope containing a cheque of $27,000 (P4) and the letter of exercise of option (P3). Then the Plaintiff went to the office of Miss Pang, the lawyer. The Defendant's husband also arrived at Miss Pang's office. The Plaintiff told him that she had handed the letter of exercise of option with the cheque to Teo Teo Sen. The Defendant's husband kept quiet. On August 25, 1980 Mr. Choong Yik Son received a letter (P15) purportedly to be sent by Teo Teo Sen whereby the envelope containing the letter P3 exercising the option and the cheque P4 was returned, purportedly for the reason that he (Teo Teo Sen) could not deliver it to the Defendant.

Teo Teo Sen testified that he signed the letter P15. I compare the signature on P15 with the signature of Teo Teo Sen for acknowledgment of receipt of subpoena (P19) and I find that the two signatures are not similar. I compare the signature on P15 with the signature of Teo Teo Sen on the reverse of warrant of arrest (P21), and I also find that the two signatures are very different. Therefore I am satisfied that the signature on P15 is not Teo Teo Sen's signature. Teo Teo Sen testified that he got a petition writer to put up the letter P15 and he paid the petition writer's charges and the charges for sending it by registered post. It is difficult to believe that Teo Teo Sen had taken the trouble to do all these and to incur expenses on his own accord and initiative. There is no reason why he should have done so. I find that it was not Teo Teo Sen who had signed the letter P15 and sent it to Syarikat Choong Yik Son. The inevitable inference to be drawn is that the Defendant was the person who sent the letter P15 and returned the letter P3 and cheque P4 to Syarikat Choong Yik Son. This inference is strengthened by the fact that the Defendant's husband knew that the Plaintiff had left the letter of exercise of option with the cheque with Teo Teo Sen. It should be noted that the Defendant's husband did not come forward as a witness and was not called by the Defendant to refute the Plaintiff's evidence that he was told by the Plaintiff at Miss Pang's office of the letter of exercise of option and cheque which the Plaintiff had left with Teo Teo Sen. It is reasonable to infer that the Defendant's husband must have told the Defendant about the letter of exercise of option and cheque

which the Plaintiff had left with Teo Teo Sen. Teo Teo Sen testified that he sent back the Plaintiff's letter on the same day on which he received it, i.e. on August 19, 1980 but this was not true as the letter P15 to Syarikat Choong Yik Son was in fact posted at Melaka on August 22, 1980 as the postmark on the envelope P16 shows. Considering all of these facts, I have no doubt that the Defendant had received the Plaintiff's letter of exercise of option and cheque from Teo Teo Sen within the time fixed for the exercise of the option.

As already stated, the Defendant contends that even if the option was exercised within the fixed time there was no concluded and binding contract between the Plaintiff and the Defendant on the ground that the option was subject to a contract being signed and no contract was ever signed. But the Defendant has failed to show that there were matters which remained to be discussed between her and the Plaintiff and which had to be embodied in a formal sale and purchase agreement. It was submitted on behalf of the Defendant that the parties had not reached agreement as to who should provide the money for discharging the property, and therefore there was no concluded contract. On cross-examination the Defendant gave the following answers to the following questions:–

Question: If you buy a house for $270,000 which has been charged for $90,000, who should pay for the discharge?

Answer: The buyer has to pay for the discharge. In this particular case if Plaintiff pays $270,000 to me I had to pay $107,000 for the discharge.

Question: So it is obvious that you had to settle the amount of the charge?

Answer: Yes.

Since the Defendant herself admitted in evidence that she agreed to pay for the discharge and to settle the amount of the charge, there was no dispute as to who should provide the money for discharging the property. It was further submitted on behalf of the Defendant that the parties had not reached agreement as to who should pay the cost of the fencing for the house, and therefore there was no concluded contract. On cross-examination the Plaintiff gave the following answers to the following questions:–

Question: Without fencing you would not have purchased the house?

Answer: I do not mean so. I just said Defendant stated about fencing. Even if fencing was not mentioned I would have bought the house.

Since the Plaintiff admitted in evidence that she was prepared to buy the house (at the price of $270,000) even if there was no fencing, this means that she agreed that she had to pay for the cost of the fencing, and it is not correct to say that there was no concluded contract because the parties had not reached agreement as to who should pay the cost of the fencing.

It was further submitted on behalf of the Defendant that even if the letter of exercise of option together with the cheque was received by the Defendant in proper time, the tender of the cheque was a bad and invalid tender for the following reasons:–

(a) bank commission was not added to the amount of the outstation cheque P4, and thus the amount tendered was actually very slightly less than 10% of the purchase price;

(b) by the time the cheque would be cashed or credited into the Defendant's bank account, the two weeks period for exercise of the option would have expired;

(c) the Defendant required the payment in cash.

But the Defendant never rejected the tender of the cheque on any of the above grounds at any time before this suit was filed, and therefore it should be treated that the Defendant had waived the right to reject the tender. If the Defendant had intended to reject the tender on any of the above grounds she should have returned the cheque to the Plaintiff giving her the reason for the rejection. This the Defendant did not do. What the Defendant did was to return the envelope containing the letter of exercise of option and the cheque to the Plaintiff's solicitors pretending that it was returned by Teo Teo Sen, and that she herself had not received it.

For the above reasons, I hold that the Defendant fails in her defence. I give judgment for the Plaintiff and grant order for specific performance to be performed within one month. The Defendant to complete the sale and transfer the property free from encumbrances. Costs to the Plaintiff. The

Defendant is given liberty to claim from the Plaintiff the cost of construction of the fencing if the fencing was completed by the Defendant.

The defendant appealed to the Federal Court.

FEDERAL COURT.

Haji Abdul Karim Bashir for the appellants.
Abdul Ghani Abdullah for the respondent.

Syed Agil Barakbah F.J. (delivering the judgment of the Court): The appeal is against the decision of Wan Hamzah, J. given at the High Court, Kuala Lumpur on December 15, 1982 giving judgment for the plaintiff/respondent.

The facts briefly are that on August 8, 1980, the appellant/defendant, a housewife residing at 7th ms. Telok Mas, Melaka, gave an option to the respondent/plaintiff to purchase her land held under H.S.(M) No. 246 for P.T. No. 35419 in the Mukim of Kuala Lumpur together with a bungalow erected thereon and known as Lot No. 39 Bukit Seputeh, Jalan Klang, Kuala Lumpur at a price of $270,000/-. The option was valid for two weeks from August 8, 1980 and the last date to exercise the option was on August 22, 1980. A sum of $300/- was paid as consideration for the option to purchase. To exercise the option the respondent was to pay a deposit of 10% of the sale price and the balance was to be paid within one month from the date the deposit was paid.

The option letter was prepared by Miss Pang a solicitor at the Melaka Office in whose presence the appellant signed the option, gave it to the respondent and received a sum of $300/-. The appellant had agreed to come to Kuala Lumpur within a few days to sign the sale and purchase agreement and on that date the 10% deposit would paid. The respondent waited for the appellant for four or five days but she did not turn up. She (the respondent) then went to Melaka and was told by the appellant that she had been busy and could not therefore be in Kuala Lumpur. On that day the appellant again promised that she would go to Kuala Lumpur in a few days' time. She failed to turn up.

On August 12, 1980 the respondent went to the appellant's house in Melaka and there the appellant told the respondent that she was not willing to sell the house and instead was prepared to pay compensation. The respondent instructed her solicitor Mr. Choong Yik Son to prepare a letter exercising the option (P3). On the following morning the respondent, her son, her brother and her brother's wife went to the appellant's house in Melaka. They could not meet the appellant although they were told by one Teo Teo Sen that she had been with the appellant a few minutes before they arrived. As the respondent was not able to see the appellant, she handed the letter in a sealed envelope containing a cheque for $27,000/- and the letter exercising the option to Teo Teo Sen to be handed to the defendant. According to the respondent the appellant's car was at the house then. The same morning the respondent went to the office of Miss Pang in Melaka and the appellant's husband also arrived there. The respondent told the appellant's husband that she had handed the letter and the cheque to Teo Teo Sen. The appellant's husband said nothing. On August 25, 1980, the respondent's solicitor received a letter (P15) purportedly sent by Teo Teo Sen together with the envelope containing the letter exercising the option and the cheque. The reason given was that the letter could not be delivered to the appellant.

The learned Judge in his very careful judgment came to the conclusion that it was not Teo Teo Sen but the appellant herself who returned the cheque and the letter exercising the option. He drew an inference from the various facts disclosed during the course of the hearing. In the learned Judge's view this finding was strengthened by the fact that the appellant's husband knew that the respondent had left the letter exercising the option and the cheque with Teo Teo Sen. The learned Judge commented adversely against the appellant for her failure to call her husband as a witness to refute the respondent's allegation.

It is to be observed that the appellant did not deny the respondent's claim that an option was made and she also did not deny the respondent's allegation as contained in para 3 of the Statement of Claim to the effect that she (the appellant) "issued to the respondent a valid and enforceable option on August 8, 1980 for two weeks from the date thereof to purchase the said property free from all encumbrances for a purchase consideration of $270,000." In the appellant's amended statement of defence in paras. 3 and 4 she averred as follows:—

"3. The Defendant admits having given to the Plaintiff an option to purchase the said property as alleged in pa-

ragraph 3 of the Statement of Claim. The said option was valid for two weeks from the 8th August, 1980 and was subject to contract being signed.

3a. The Defendant contends and will contend that since the option was subject to contract being signed and no contract was ever signed, there was no concluded contract between Plaintiff and the Defendant.

4. The Defendant has no knowledge of the allegations contained in paragraph 5 of the Statement of Claim."

Substantially the appeal evolves around a question of fact. In this regard we see no reason to differ from the finding of the learned Judge that the respondent did exercise the option by tendering the 10% deposit, a sum of $27,000/- within the two week period stipulated in the option but this was rejected by the appellant. In our view it is quite apparent that there was a change of heart on the part of the appellant and she had decided to repudiate the agreement. This is evident by the fact that she omitted to turn up in Kuala Lumpur as promised on two occasions. More importantly she had not challenged the respondent's allegation that she had told the respondent that she was no longer willing to sell the property. The appellant's husband was fully in the picture and in fact he had full knowledge of the fact that the respondent had properly exercised her option. This explained the reason for the return of the letter exercising the option and the cheque to the respondent.

The only question of law raised by the appellant in her defence is to be found in paras 3 and 4 of the amended defence *(supra)*. In this respect the learned Judge made a finding as follows:

"But the Defendant has failed to show that there were matters which remained to be discussed between her and the Plaintiff and which had to be embodied in a formal sale and purchase agreement."

In the circumstances of this case we see no merit in the appellant's contention. In our view the evidence and exhibits in this case and also the conduct of the appellant clearly show that it was the intention of the parties to come to a definite and complete agreement on the subject of the sale. What remained to be done was for the respondent to exercise the option in accordance with the terms stated in the option. The mere fact that it was subject to an agreement to be signed did not necessarily mean there was no legal binding and enforceable agreement. (See *Lim Keng Siong & Anor.* v. *Yeo Ah Tee*).[1]

In our judgment the learned Judge had not erred at all in law or in fact in arriving at the decision that he did. For this reason therefore we would dismiss this appeal with costs.

Appeal dismissed.

Solicitors: *Bashir & Co.; Choong Yik Son.*

RETHANA v. GOVERNMENT OF MALAYSIA

[F.C. (Mohamed Azmi F.J.) March 13 to 20, 1984]
[Kuala Lumpur – Federal Court Civil Application No. 2 of 1984]

Constitutional Law – Application for declaration that Employees' Social Security Act is unconstitutional – Whether application has to be made in Federal Court and whether leave of a Judge of the Federal Judge has to be obtained – Federal Constitution, arts. 4(3) & (4); & 128

In this case the applicant was injured while working in a factory and lost her thumb and three fingers. Under the provisions of the Employees Social Security Act, 1969 she belonged to a class of employees who were insured against such accidents and accordingly she was awarded a benefit of $1.50 per day giving her a sum of about $1,026 over a period of two years. She refused to accept the award contending that it was unconstitutional in that if she were not barred by the Act to sue her employees for negligence she could expect to get much higher damages. She applied to a Judge of the Federal Court for leave to commence proceedings in the Federal Court for a declaration that the Act was inconsistent with various provisions of the Constitution and further for a declaration that the Act is void to the extent of such inconsistencies.

Held: in the present case the Employees Social Security Act, 1969, is being challenged not on the basis that Parliament has no power to enact it but on the ground that some of its provisions are inconsistent with certain provisions of the Constitution. The intended suit is within the jurisdiction of the High Court and therefore the provision of Article 4(4) of the Federal Constitution regarding leave to commence proceedings in the Federal Court does not arise.

Cases referred to:

(1) *Syarikat Banita Sdn. Bhd.* v. *Government of State of Sabah* [1977] 2 M.L.J. 217, 218.

(2) *East Union (M) Sdn. Bhd.* v. *Government of the State of Johore and Government of Malaysia* [1980] 2 M.L.J. 143.

FEDERAL COURT.

Karam Singh Veriah for the applicant.

Datuk Abu Mansor Ali (Senior Federal Counsel) for the respondent.

Cur. Adv. Vult.